

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S BRIEF
AND
APPENDIX**

77-1111

To be argued by
THOMAS P. SMITH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1111

13

UNITED STATES OF AMERICA,

Appellee,

—v.—

ENRIQUE MELENDEZ,

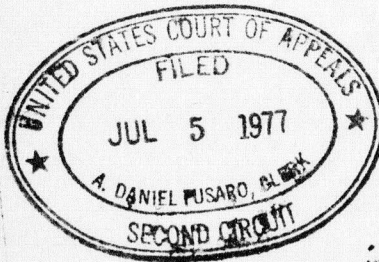
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF AND APPENDIX FOR THE APPELLEE

PETER C. DORSEY
United States Attorney
District of Connecticut
141 Church Street
New Haven, Connecticut 06510

THOMAS P. SMITH
Assistant United States Attorney
for the District of Connecticut



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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1111

UNITED STATES OF AMERICA,

Appellee,

—v.—

ENRIQUE MELENDEZ,

Appellant.

BRIEF FOR THE APPELLEE

Statement of the Case

A Grand Jury in Hartford returned a three-count indictment on March 25, 1976, charging Enrique Melendez, a/k/a "Kiki", and Jesus Ortiz, a/k/a "Chombo", with distributing cocaine, possessing cocaine with intent to distribute it, and conspiring to distribute that substance. Title 21, United States Code, sections 841(a)(1) and 846.

On July 7, 1976, a special purpose information was filed with the District Court, charging Melendez with previously having been convicted of a federal narcotics violation.¹ Shortly thereafter Melendez moved to pro-

¹ That information, denominated by the government as a "Notice" to the Court in order to avoid clerical confusion, was filed pursuant to Title 21, United States Code, section 851(a)(1).

[Footnote continued on following page]

hibit the government from using his prior conviction for impeachment purposes at trial. This motion was denied, and a jury was then selected.

Due to the unavailability of counsel for the defendant Melendez, his case was severed from that against Jesus Ortiz. On July 27, 1976, Ortiz was tried before the Honorable T. Emmet Clarie and a jury. On the following day Ortiz was found guilty on all counts. He was subsequently sentenced to seven years on each count, to run concurrently. That conviction was affirmed in *United States v. Ortiz*, — F.2d — (2d Cir. 1977), Docket No. 76-1460 (April 11, 1977).

On November 16, 1976, Melendez moved to disqualify Judge Clarie because he had presided over the trial of co-conspirator Jesus Ortiz, had sentenced Melendez after his 1970 heroin conviction, and had subsequently violated his probation in 1973. This motion was denied, and a jury was once again selected.

Trial commenced on January 6, 1977. On the afternoon of the following day the jury returned a guilty verdict on all three counts of the indictment. On February 14, 1977 defendant Melendez was sentenced to seven years on each count, the sentences on each to run concurrently, and a three year special parole term. It is from this judgment of conviction that Enrique Melendez, who is currently free on bond, has appealed.

The theoretical effect of such a filing is to double the maximum sentence to which a defendant is exposed. Thus, on *each* of the three counts on which Melendez was convicted, his maximum exposure was 30 years imprisonment. See App. 1a. The purpose of Congress in enacting his provision is explained in *United States v. Buia*, 236 F.2d 548, 550 (2d Cir. 1956). Also see *Tanzer v. United States*, 278 F.2d 137, 140 (9th Cir.), *cert. denied*, 364 U.S. 863 (1960).

Statutes Involved

Title 28, United States Code, section 455:

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Rule 609, Federal Rules of Evidence, 28 U.S.C.A.:

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Issues

1. Did the prosecutor's closing argument, which did not contain personal assertions, denigrating remarks, or unfair characterizations, and which the District Court expressly found to be non-prejudicial, deny the appellant a fair trial?
2. Did the trial judge commit reversible error in refusing to disqualify himself on the grounds of personal bias and prejudice against the appellant?

3. Did the District Court commit an abuse of discretion in refusing to prohibit the government from using appellant's prior heroin distribution conviction for impeachment purposes at his later cocaine distribution and conspiracy trial?

Statement of the Facts

On the afternoon of February 4, 1976, undercover Connecticut State Trooper Rafael Valentin and Luis Placidio Lopez, a confidential informant who was then assisting state and federal narcotics authorities in numerous on-going drug investigations, drove to a multi-family apartment building located at 15 Cabot Street in Hartford (Tr. 37-39).² Their purpose in going there was to purchase a "quarter piece" (i.e., one-fourth ounce) of cocaine³ from Efrain Melendez, a/k/a "Frankie", the brother of Kiki Melendez and the brother-in-law of Jesus Ortiz (Tr. 36-37, 39).⁴ Although Frankie Melendez did

² References marked "Tr." refer to the transcript of the trial before the United States District Court.

³ Trooper Valentin, a law enforcement officer with over eight years' experience, approximately three years of which have been devoted to narcotics investigations, testified that the term "quarter piece" refers to bulk narcotics, as opposed to bags, which contain a smaller amount of controlled substance (Tr. 40). It was further established by Valentin that there are approximately 75 to 100 bags in a "quarter piece", and that the average price per bag of cocaine was approximately \$20 to \$30 at the time of trial (Tr. 40-41).

⁴ To minimize confusion between the Melendez brothers, Enrique Melendez, the co-defendant of Jesus Ortiz will hereafter be referred to as Kiki Melendez. Efrain Melendez, a/k/a "Frankie Quevas", will hereafter be referred to as Frankie Melendez. This procedure was used during the trial (Tr. 36-37). Jesus Ortiz, a/k/a "Chombo", was regularly referred to throughout the trial by his proper name, except on a few occasions when Luis Lopez, the government's chief witness, referred to him simply as "Chombo". (See, e.g. Tr. 115).

not reside there at that time, he was known frequently to be on the premises (Tr. 115). Jesus Ortiz and Kiki Melendez, however, did reside at 15 Cabot Street (Tr. 115-116).

Trooper Valentin and Lopez entered the building and began to walk to a second floor apartment. Outside the apartment they met an unidentified man, and asked for Frankie Melendez. At this point Kiki Melendez opened the door to his apartment and inquired, "Who is asking for Frankie?" (Tr. 45). Valentin explained that he and Lopez was looking for Frankie because they wanted to buy a "quarter-piece" of cocaine (Tr. 45). Kiki Melendez became "hesitant" and "disturbed" (Tr. 99), and responded to Trooper Valentin, "*How do I know you are not the man?*" (Tr. 45). At this juncture Lopez informed Kiki Melendez that he (Lopez) had "served time" with Frankie Melendez and, therefore, could not be "the man" (Tr. 33, 196, 260). Still apparently not satisfied with Lopez's and Valentin's "credentials", Melendez nevertheless told them to leave (Tr. 45).⁵ Consequently, Valentin and Lopez left.

⁵ Appellant's statement of the "facts" makes no reference whatsoever to the conversation between him and Trooper Valentin on February 4th. Appellant's only reference to this sequence of events is his statement that "On the first of these occasions [i.e., February 4, 1976], Enrique Melendez appeared mad at Valentin and Lopez and ordered them to leave" (see Appellant's Brief at 2, ¶ 4). This creates the misleading impression that Kiki Melendez displayed pristine indignation at the very suggestion that he sell cocaine. This is hardly the case. As the evidence indicates, as early as February 4th Kiki Melendez demonstrated: (1) cautiousness and stealth, (2) an inferential willingness to "deal" with someone whom he was sure was *not* "the man", and (3) access to cocaine. Moreover, these traits were exposed not simply to Luis Lopez, but to an undercover Connecticut State Trooper.

Appellant's failure to recount these facts, it is respectfully submitted, is evidence of a gross lack of objectivity and a clear propensity toward taking select facts completely out of context. Unfortunately, this occurs throughout appellant's brief.

The next time Trooper Valentin and Luis Lopez saw Kiki Melendez was on the afternoon of February 9, 1976. On that date Valentin and Lopez returned to 15 Cabot Street, once again seeking to buy a "quarter piece" of cocaine from Frankie Melendez (Tr. 46-47). As they reached the second floor hallway immediately adjacent to the apartment at which they had spoken to Kiki Melendez on February 4th, Valentin and Lopez met two unidentified women and asked for Frankie (Tr. 47). During the course of this conversation, Kiki Melendez once again came to the door (Tr. 47). At this time Lopez and Valentin once again explained that they had returned to buy a "quarter piece" from Frankie (Tr. 48). The brief discussion hereafter described by undercover Connecticut State Trooper Rafael Valentin then took place:

A. We told him we didn't want any arguments, because we argued the day of the 4th, and he said "Well, I'm sorry, but, you know, I don't know who you guys are. *I didn't know who you guys were*"—or something to that effect.

We told him we were buying a quarter piece, and he said "Well, Frankie sold a piece this morning, and he's not here. And whatever he had, he has under lock and key. I have bags."

Q. Kiki said "I have bags"?

A. Yes. At this point I had started to walk down the stairs, and I overheard Mr. Melendez say to Mr. Lopez that if he wanted bags to come by himself.

Mr. Buckley: I object. . . .

The Court: Objection overruled.

The Witness: Mr. Kiki Melendez, as I was walking down the stairs, told Mr. Lopez that if he wanted to buy bags he would sell bags, but he wouldn't sell them to me.

By Mr. Smith:

Q. Kiki Melendez told Luis Lopez that he, Kiki, had bags?

A. Yes.

Q. Kiki Melendez told Luis Lopez, in your presence, that he, Kiki, would sell those bags to Luis?

A. Yes.

(See Tr. 47-49).

Because they were still hopeful of buying bulk cocaine from Frankie Melendez, Valentin and Lopez initially declined Kiki Melendez's invitation to sell bags of cocaine to Luis Lopez (Tr. 49). Consequently, Valentin and Lopez then left 15 Cabot Street and drove directly to a bar at the corner of Albany Avenue and Chestnut Street in Hartford, looking once again for Frankie Melendez and the desired "quarter-piece" (Tr. 50). That bar, widely known by law enforcement personnel simply as the "Spanish Bar", and described by Valentin as a "hot spot" for narcotics activity, is located minutes away from 15 Cabot Street (Tr. 50, 58).

Shortly after arriving at the Spanish Bar, while Lopez and Valentin were still seated outside in their undercover vehicle, they again saw, and engaged in brief conversation with Kiki Melendez (Tr. 50).⁶ At this time

⁶ Appellant's statement of the "facts" similarly makes no mention of this incident. This creates the misleading impression that Trooper Valentin only briefly overheard a *single* conversation between Kiki Melendez and Luis Lopez, that conversation occurring at 15 Cabot Street on February 9th. In actuality, however, Valentin overheard or actually participated in criminal conversations with Kiki Melendez on *three* entirely separate occasions at two different places: (1) the February 4th conversation at 15 Cabot Street; (2) the February 9th conversation at 15 Cabot

[Footnote continued on following page]

Melendez, who had walked to the passenger's side of the car in which Valentin and Lopez were sitting, freely and openly reiterated once again in Valentin's presence that he would sell "bags" of cocaine to Lopez, but that he would not deal with Valentin (Tr. 50-51). Melendez finally instructed that if Lopez wanted "bags" of cocaine, he should go back to 15 Cabot Street, "but to come back by himself and not bring [Valentin]" (Tr. 51, 119).

Pursuant to Kiki Melendez's directions, Luis Lopez and Rafael Valentin returned to Cabot Street on the following day, February 10, 1976. Pursuant also to Kiki Melendez's instructions of the previous afternoon, Luis Lopez entered 15 Cabot Street alone, leaving Trooper Valentin seated outside in his automobile,⁷ and went to the same second floor apartment to which he and Valentin had gone the afternoon before (Tr. 52-53, 119-120). Immediately outside the apartment Lopez met an unidentified woman and a young man. Lopez informed them that he was there to buy some cocaine. The unidentified young man responded that "Frankie is not here" and "Kiki is sleeping" (Tr. 122-123, 132). Lopez then left the building to rejoin Trooper Valentin outside (Tr. 132).

Street; and finally, (3) the February 9th conversation outside the Spanish Bar. Hence, the government's case against Kiki Melendez was actually quite strong. Moreover, the government's case against Kiki Melendez was further strengthened by the fact that defense counsel never even attempted to cross-examine Trooper Valentin with respect to *any* of these conversations, but chose simply to ignore Valentin's testimony in the belief that it was irrelevant.

⁷ Prior to going to 15 Cabot Street on February 10th, Lopez and Valentin met with surveillance troopers and federal agents at a rented apartment which was used as a "base of operations" during this and other investigations in progress at the time. As part of normal procedures Lopez was searched, both for contraband and money, before entering 15 Cabot Street (Tr. 52-53).

Just as Lopez left the building, however, the young unidentified man with whom he had just spoken called him from a second floor window overlooking the sidewalk, telling him to come back (Tr. 132). Lopez's exit and almost immediate re-entry was witnessed by Trooper Valentin (Tr. 53). Lopez then re-entered the apartment and walked once again to the second floor (Tr. 132-133). When he arrived at the second floor, Kiki Melendez was standing there with the unidentified young man (Tr. 132-133). Melendez asked what Lopez wanted. Lopez replied that he still wanted to buy a "quarter piece." Kiki Melendez responded that Frankie Melendez was not there, but that he himself had 15 "bags" of cocaine which he would sell to Lopez for \$180. (Tr. 133). Lopez stated that he would get the money from his friend outside, and left once again to rejoin Valentin (Tr. 133).

Lopez then reentered 15 Cabot Street with money obtained from Valentin. When Lopez got to the second floor of the building, he again met Kiki Melendez. Melendez then led Lopez upstairs to the third floor of the building, where Jesus Ortiz, a/k/a "Chombo", was standing in the open doorway to his apartment, waiting for Kiki Melendez and Lopez (Tr. 134). Ortiz thereupon invited Melendez and Lopez into the apartment, and immediately thereafter instructed an unidentified female, who was present in the apartment, to bring him the cocaine (Tr. 134). The unidentified woman then entered the room and produced an aspirin tin, which she handed to Jesus Ortiz (Tr. 134). Ortiz opened the tin and counted out 15 tin foil packets, which he handed to Melendez (Tr. 134). Melendez then recounted the packets and handed them to Lopez (Tr. 134). Lopez then handed \$180 to Kiki Melendez, which Melendez in turn counted and then handed back to Jesus Ortiz (Tr. 134). At the conclusion of the transaction, Kiki Melendez advised Lopez that there was a "panic" in the neighborhood, that nobody in the area had any cocaine "but them," and that Frankie was then at the Spanish Bar and could, perhaps, give

Lopez a "better price" on additional cocaine (Tr. 134-135).

Lopez then left 15 Cabot Street and, upon rejoining Trooper Valentin outside, surrendered the 15 "bags" to him (Tr. 55-56, 137). These bags contained cocaine (Tr. 245). Pursuant also to Kiki Melendez's instructions, Valentin and Lopez then drove once again to the Spanish Bar. This time, just as Kiki Melendez had stated they would, Valentin and Lopez finally met Frankie Melendez (Tr. 58, 61-62), from whom Trooper Valentin and Lopez then bought additional cocaine (Tr. 135-136, 140-141).

I.

The prosecutor's closing argument, which was fully supported by the evidence in each and every respect, and which the District Court explicitly found to be non-prejudicial, did not in any way deny the appellant a fair trial.

The government respectfully submits that appellant's characterization of the prosecutor's closing argument is unfair and unsupported by an objective examination of the record. Specifically, the government maintains that appellant has taken isolated passages totally out of the context in which they were spoken, has repeatedly described them either erroneously or exaggeratedly, and has simply omitted, or misstated, several critical facts which are essential for a proper evaluation of that argument. This approach, it is suggested, is directly contrary to the well-settled principle that closing arguments must be considered as a whole, and that *allegedly* objectionable statements made during arguments must be viewed against the context of the entire trial. *United States v. White*, 486 F.2d 204, 207 (2d Cir. 1973); *United States*

v. *Lawler*, 413 F.2d 622, 625 (7th Cir. 1969); *United States v. Wilkins*, 422 F.Supp. 1371, 1377-1378 (E.D. Penn. 1976).

A. The government's case against the appellant was not a "weak" one

Since even minor error can sometimes reach constitutional proportions in a factually weak case, *see, e.g., United States v. Grunberger*, 431 F.2d 1062, 1067 (2d Cir. 1970), the overall strength of the government's case is a factor which should fairly and accurately be brought to the attention of this Court. Without even mentioning the testimony of Connecticut State Trooper Rafael Valentin, the appellant characterizes the case against him as "weak". The government strongly disagrees with this description.

An examination of the record indicates that there was unchallenged, and hence *uncontroverted*, testimony by undercover Connecticut State Trooper Rafael Valentin as to three separate criminal conversations in which the appellant participated. The last two of these conversations occurred a matter of hours before the commission of the substantive offenses. At these times, according to Valentin, the appellant, *not once but twice*, offered to sell bags of cocaine to Luis Lopez at 15 Cabot Street, but only on the condition that he return there *alone*. This testimony, which the defense chose simply to ignore both during cross-examination and during its summation (just as it apparently chose to omit referring to it in its statement of "facts" to this Court), constituted unimpeached, compelling evidence that appellant Melendez deliberately structured the instant transaction in such a way that on one whom he considered "unsafe" would witness the physical transfer of

the cocaine.* In short, it was, and is, unrefuted that he himself created the circumstances and conditions upon which he later sought to rely. In sum, it was, and is, uncontested that Luis Lopez, a link which the appellant himself forged into the government's chain of evidence, *simply followed Melendez's instructions* by entering 15 Cabot Street alone on February 10, 1976. Such evidence is hardly the hallmark of a "weak" case.

B. Several factors, including the District Court's finding that the closing argument in question was non-prejudicial, the fact that the prosecutor prefaced his closing argument, and the Court's comments to counsel at the end of the case, greatly undercut appellant's claim

Appellant's attack on the prosecutor's summation fails to mention, much less treat, several significant events

* Besides establishing that appellant had access to cocaine, was willing to deal with someone he regarded as "safe", and, conversely, was unwilling to deal with someone who might be "the man", Valentin's testimony established other things as well. First, it identified the particular configuration of cocaine which appellant stated he was willing to sell. Second, it fixed the location at which the appellant was willing to sell cocaine (i.e. 15 Cabot Street). Third, it created a time frame within which appellant's possession within intent to distribute could logically, reasonably, and fairly be inferred to continue. Forth, by relating the change which occurred in appellant's attitude toward Luis Lopez between February 4th and February 9th, it formed the basis for a totally reasonable inference that the appellant Melendez had obviously taken steps to "check out" whether Lopez truly had been in Lewisburg with Frankie Melendez and, hence, was "safe". Finally, and we think also importantly, the testimony of Trooper Valentin also indicated that, of all the various people whom he had met at 15 Cabot Street in his pretended quest for a "quarter piece" it was uniformly, consistently, and exclusively Kiki Melendez to whom they ultimately talked, and to whom they were directed, on each occasion.

which indicate that his arguments lack merit. Initially, the appellant fails to mention that, after presiding over the trial and listening to the closing argument presently under attack, the District Court rejected the very same contentions which appellant now urges this Court to accept, explicitly finding that the summation in question was neither prejudicial nor accurately described by defense counsel. That finding is significant for two reasons. First, the fact that the trial court expressly found the instant argument to be non-prejudicial distinguishes the present case from *United States v. Burse*, 531 F.2d 1151 (2d Cir. 1976) and *United States v. Bledsoe*, 531 F.2d 888 (8th Cir. 1976), the two cases on which appellant places principal reliance, and which the government maintains are in any event so drastically different from this case that they are inapposite.⁹

Secondly, that finding constitutes an impartial, objective judgment as to the propriety of what the prosecutor said, the way in which he said it, and the context in which the words now under attack were spoken. As the Court in *D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1951) observed:

"The trial judge had an opportunity far superior to that afforded us to judge whether the remarks of counsel in the setting in which they were given constituted such misconduct as to require a more

⁹ In *Burse* the prosecutor intentionally misrepresented facts, came "dangerously close" to commenting on defendant's failure to testify, was admonished several times by the trial court, accused the defense's key witness of being drunk when she testified, and continually told the jury "we know" certain testimony is true. 531 F.2d at 1153-1155. In *Bledsoe*, the prosecutor introduced evidence of the accused's birth out of wedlock, several arrests and convictions, and intimated that the non-testifying defendant, who had an IQ of 75, had been told by his probation officer to stay away from guns. 531 F.2d at 890-891. Absolutely nothing of this nature occurred in the present case.

emphatic admonition or instruction to the jury to disregard. . . . Our system of jurisprudence properly makes it a matter primarily for the discretion of the trial court to determine whether prejudicial misconduct has occurred. An appellate court will not review the exercise of the trial court's discretion in such a matter unless the misconduct and prejudice is so clear that it can be said that the trial judge has been guilty of an abuse of discretion." *Id.* at 367.

Such a finding should be accorded great weight by a reviewing court. *United States v. Caniff*, 521 F.2d 565, 572 n. 6 (2d Cir. 1975), *cert. denied sub nom. Benigno v. United States*, 423 U.S. 1059 (1976). *Accord United States v. Roth*, 466 F.2d 1111, 1113 (9th Cir. 1972); *Orebo v. United States*, 293 F.2d 747, 749-750 (9th Cir. 1960); *United States v. Parkison*, 417 F. Supp. 730, 734-735 (E.D. Wisc. 1976). The government respectfully requests that the trial court's finding be similarly regarded in this case.

The government next respectfully calls this Court's attention to the fact that, prior to beginning his actual summation, and exclusively for the purpose of insuring that the jury would *not* regard any of his arguments as personal assertions, the prosecutor prefaced his closing argument with a detailed explanation to the jury (Tr. 257). That explanation, which is not mentioned by the appellant, advised the jury that none of the arguments which the prosecutor was about to make should be regarded as personal assertions, that any findings they made should be "based upon the facts", that they were the "judges of the facts," and that they could find anything which they chose (Tr. 257-258). Additionally, there was repeated emphasis throughout the prosecutor's argument that it was the jury's function to think criti-

cally about *all the theories* placed before it, to decide the case independently on the *basis of the evidence* and to be *fair to both sides* in this case. (See, e.g. Tr. 266, lines 8-12; Tr. 271, lines 7-10; Tr. 273, lines 4-14; Tr. 281, lines 8-13; Tr. 283, lines 3-8; Tr. 288, lines 11-16).

Thirdly, and particularly with respect to appellant's claim that the prosecutor repeatedly denigrated defense counsel, the government asks this Court to consider the following remarks which the trial judge made to the jury after they had reported their verdict.

The Court:

"Thank you, ladies and gentlemen, for your attention to this matter. It has been a short trial, and *two very capable, young attorneys presented it, both ardently and sincerely*, and both are very able young men."

(Tr. 378). These remarks, the government submits, serve not simply to distinguish the present case from cases like *Burse, supra*; *Bledsoe, supra*; and *United States v. Drummond*, 481 F.2d 62 (2d Cir. 1973) (where the trial court repeatedly admonished the prosecutor), but function also as proof positive that in the judgment of the trial judge there was nothing prejudicial, insincere, or egregious in *what* the prosecutor said or the *way* in which he said it. Surely, the Chief Judge of the District, a highly competent and experienced trial judge, see *United States v. Housand*, 550 F.2d 818, 822 (2d Cir. 1977), would not permit any such misconduct in his Court and then compliment the ability and sincerity of the party responsible.

These three things, the government respectfully maintains, greatly undercut the appellant's claim of prejudicial misconduct on the part of the prosecutor, and demonstrate a general lack of merit to his contentions.

C. The prosecutor did not improperly anticipate, and address himself to, the issues appellant raised in his opening statement and more fully developed on cross-examination

Appellant's argument that the prosecutor improperly anticipated, and addressed himself to, the theory of the defense during his initial opening statement lacks merit. This is especially so in view of the fact that, prior to summations, appellant requested a jury charge on the inferences and theories he raised during cross-examination (Tr. 249, 254), and initially made an opening statement (Tr. 22-24). It was at this point that the appellant first set the tone of his defense by describing Luis Lopez, erroneously it is submitted, as a man whom the government pays "cash on the barrel head . . . for delivering bodies" (Tr. 23) and, implicitly with the government's blessing, framing people. It was also at this early stage of the trial that the defense declared that, *as far as it was concerned*, Luis Lopez was motivated to lie by money and a desire to ingratiate himself with the law, and was not, therefore, worthy of belief. Thus, the credibility of Luis Lopez was early placed into issue, and was later subjected to a blistering attack which encompassed approximately 82 pages of cross-examination (See Tr. 144-226).

Since the defense declared in its opening statement its conception of the issues, its theory, and its views as to the vulnerability of Luis Lopez, all of which were later more fully pursued during cross-examination, the government respectfully submits that it was perfectly permissible for it to analyze these issues, theories, and views during its initial summation. Appellant's claim to the contrary (*i.e.*, that the government is foreclosed from addressing itself to defense theories until rebuttal) conflicts with the policy of Rule 29.1, F.R. Crim. P., and the principle that

either counsel may properly comment on any matter which is brought to the attention of the jury. See, 8A Moore's, *Federal Practice* ¶ 29.1.02 (Cipes ed.); *Johnson v. United States*, 347 F.2d 803, 805 (D.C. Cir. 1965); *United States v. Weisman*, 366 F.2d 767, 768 (2d Cir. 1966); *United States v. Petrelli*, 331 F.2d 792, 796 (N.D. Ill. 1971). The fact that appellant requested an instruction on these very theories is a clear indication that he too regarded them as having properly been put before the jury at that juncture.

D. The prosecutor did not impermissibly vouch for the credibility of the government's witness

The government respectfully submits, and urges this Court to find, as did the trial court, that the prosecutor did not impermissibly vouch for the credibility of the government's witness. Specifically, appellant complains that during the course of its summation the prosecutor improperly told the jury that Luis Lopez had no motive to lie; referred to the consequences of committing perjury and stated that Lopez had no reason to subject himself to prosecution on such a charge; and on more than one occasion spoke the words, "he is telling you the truth", and "he is not lying". Each of these claims lacks merit for the following reasons.

Appellant's complaint that the prosecutor strongly argued to the jury that Luis Lopez was telling the truth and had no motive to lie overlooks several facts. Chiefly, it overlooks the fact that the appellant began to attack the credibility of Lopez in its opening statement (Tr. 22-24) by branding him, in effect, as a bounty hunter. This attack continued throughout his entire cross-examination which comprises 82 pages of transcript. As a matter of fact, even the cross-examination of Trooper Rafael Valentin was designed, not to impeach Valentin, but to

annihilate further the credibility of Luis Lopez. During the course of this cross-examination it was repeatedly suggested by the defense that Lopez was lying and that his motive was money and a desire to ingratiate himself with the authorities. The defense theory, as set forth in its opening statement, was that: (1) Lopez was paid by the number of people "he set" up and, therefore, implicitly with the government's blessing, tried to frame as many people as he could, and (2) Lopez would lie to stay on good terms with the government so that he could later seek its help when he himself got in trouble.

The fatal defect in appellant's theory, however, was that it simply received no support from the evidence. The entire thrust of the prosecution's closing argument was directed toward analyzing this theory and all of its implications, as well as suggesting a better, competing theory which *was* supported by the evidence. The government respectfully submits that a careful reading of the prosecution's closing argument clearly indicates that, taken in context, each of the remarks which the appellant characterizes as impermissible "vouching" is in reality nothing more than an assertion that the evidence supports the government's, and not the defendant's, theory of the case. To claim, as appellant now does that these remarks constituted personal assertions totally disregards the prosecutor's clear explanation to the jury, "If when I am going over these facts I should say 'I', or . . . 'I believe', or 'we submit', what I am saying to you is that the Government's position is that you should find on the basis of the facts that a certain thing occurred." (Tr. 257).

Since the appellant thrust the character and credibility of the government's chief witness into issue, it was perfectly permissible for the prosecutor to respond to that attack by subjecting the defense's theory to court-

room analysis. As this Court stated in *United States v. Armedo-Sarmiento*, 545 F.2d 785 (2d Cir. 1976):

"When the character and credibility of accomplice witnesses have been strenuously attacked by defense counsel, responsive comment by the government is not forbidden. The prosecution may appropriately discuss the necessity of using unsavory witnesses and may attempt to bolster their testimony by reference to other evidence in the case. This does not constitute forbidden endorsement by the government of the accomplice's testimony. *United States v. Davis*, 487 F.2d 112, 124-25 (5th Cir. 1973), *cert. denied*, 415 U.S. 981, 94 S. Ct. 1573, 39 L. Ed. 2d 878 (1974)." *Id.*, at 793-94.

Also see *Orebo v. United States*, 293 F.2d 747, 749-50 (9th Cir. 1961). This is equally true with respect to insinuations made by the defense during cross-examination. *United States v. Bivona*, 487 F.2d 443, 446-47 (2d Cir. 1973).

The prosecutor was also entitled strenuously to reply, by way of an analysis of the evidence, to the implication that the appellant was being framed by Luis Lopez and the government. *United States v. Bentner*, 457 F.2d 1174, 1177 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972). He was also entitled to respond to the insinuation that the government purchased Lopez's testimony with favors. *United States v. LaSorsa*, 480 F.2d 522, 526 (2d Cir. 1973), or conversely that expected favors motivated him to testify falsely. As this Court recently observed:

"The prosecutor was entitled to marshal all the inferences which the evidence supported." *United States v. White*, 486 F.2d 204 (2d Cir. 1973), *cert. denied*, 415 U.S. 980, 94 S. Ct. 1569, 39 L. Ed. 2d 876 (1974).

* * * * *

"A substantial portion of the defense summations was devoted to an attack upon the Government witnesses, Thurlow, Mitchell and Palmer. The contention was repeatedly made that these men were escaping prosecution and sentence because of their aid to the Government. Undoubtedly, it was this attack that prompted the prosecutor to point out that these men had served their time and that, if defendants were acquitted, 'they'll be laughing all the way to Williams Island'.

"A prosecuting attorney is not an automaton whose role on summation is limited to parroting facts already before the jury. He is an advocate who is expected to prosecute diligently and vigorously, albeit without appeal to prejudice or passion. His task is not rendered easy by the 'no holds barred' tactics indulged in by all too many defense counsel in recent years." *United States v. Wilner*, 523 F.2d 68, 73-74 (2d Cir. 1975).

Such "no holds barred" tactics were similarly employed in the present case.¹⁰ See also *United States v. Greenbank*, 491 F.2d 184, 188 (9th Cir.), *cert. denied*, 417 U.S. 831 (1974).

¹⁰ Appellant's cross-examination, the government respectfully submits, was both unfair and improper in several respects. Not only was Lopez improperly asked in the jury's presence to give a "guestimate" as to the number of times he had been arrested since 1952 (Tr. 144), he was also argued with, badgered (Tr. 162), and repeatedly questioned on the basis of arrests which occurred well prior to his presence, much less his cooperation in this District (See, e.g. 80, 144, 148).

Through its questions both to Luis Lopez and Trooper Valentin, the defense also improperly, and without factual basis, attempted to create the misleading impression that Lopez had possessed a "sawed-off shotgun" shortly before his testimony

[Footnote continued on following page]

While the prosecutor, concededly, during his 33 page summation spoke on more than one occasion the phrases "he is not lying" and "he is telling the truth", these words in themselves do not constitute impermissibly vouching for the credibility of a government witness. *United States v. Santana*, 485 F.2d 365, 370 (2d Cir. 1973); *United States v. Bivona*, 487 F.2d 443, 446-47 (2d Cir. 1973). Nor is it necessary each time such a phrase is spoken to conjoin it with the addendum "on the basis of the evidence". *Ferina v. United States*, 302 F.2d 95 (8th Cir. 1962), *cert. denied sub nom. Candarella v. United States*, 371 U.S. 819 (1963) makes this much clear. In *Ferina* the Court observed:

"In the case of *United States v. Klein* (7th Cir. 1951), 187 F.2d 873, p. 876, *certiorari denied*, (1951), 341 U.S. 952, 71 S. Ct. 1021, 95 L. Ed. 1374, the Court states:

'It is hypercritical to say that because, in discussing testimony and its effect, a district attorney uses the words "I know, etc." he is thereby testifying on behalf of the prosecution.
* * *'

(Tr. 78), and that all of the money which Lopez had been paid for his work on case No. B2-76-0014 pertained only to the case against Kiki Melendez (Tr. 67, 68, 70, 75, 182, 183). In fact, however, as counsel well knew, and later admitted out of the presence of the jury, the payments Lopez received actually pertained to several cases against *three* individuals (Tr. 140-41).

But this is not all that was done by the defense to discredit the government's case. The defense also implied that Lopez had intentionally failed to give certain testimony during his direct examination when in reality, as counsel also knew, it was at the request of the defense that the Court had previously directed the government not to venture into that area (Tr. 196). Still later, the defense also unfairly and, the government respectfully maintains, without any factual basis, further impeached Lopez by dramatically inquiring as to whether he himself had ever used drugs with certain individuals (Tr. 188-89). These individuals, of course, were never produced.

Also see Part III, B, *infra*.

It is not required that a prosecuting attorney in his jury argument continue to repeat in connection with every statement made by him the words, 'as shown by the evidence and the proper inferences therefrom', if the jury understands that his argument is based upon the evidence and the inferences properly drawn therefrom. In the present case the attorney for the Government at the outset of his argument informed the jury he would demonstrate to it from the evidence adduced that the Government had a case against the defendants. In overruling the objection of the defendants to the statement in question, the trial judge stated, in substance, that he regarded the statement in question as being based on inferences drawn from the record in the case." *Id.*, at 106.

This is especially so where, as here, the prosecutor clearly made the remarks in the context of a rather detailed analysis of the evidence, spoke the phrases in question in such a manner that they were obviously intended, *and received*, as assertions that the jury *could* find from the evidence previously discussed, and beforehand specifically told the jury that what he meant every time he made an assertion was that they "should find on the basis of the evidence that a certain thing occurred". This, the government respectfully urges, is clear from an objective consideration of the content, tone, and manner of delivery of the summation in question. And this, the government submits, is the reason why the trial judge rejected appellant's arguments expressly finding that the argument was not prejudicial.

Similarly, there is no merit to appellant's claim that the prosecutor impermissibly told the jury that Luis Lopez "had no motive to lie", and further addressed himself to the consequences which flow from committing perjury in federal court. This Court recently made that observation

in *United States v. Ricco*, 549 F.2d 264 (2d Cir. 1977). There the Court stated:

"The various attacks on the propriety of the government's summation merit only brief discussion. Remarks by the Assistant United States Attorney to the effect that the government accomplice witnesses would be subject to indictment for perjury and other previously uncharged offenses in the event they testified falsely were amply supported by testimony already before the jury and did not prejudice the appellants. These comments did not amount to the government's improper vouching for its accomplice witnesses but simply constituted permissible argument to the effect that these witnesses, whose veracity and credibility had been fiercely attacked by defense counsel, had no motive to testify falsely. *United States v. Aloï*, 511 F.2d 585, 597-98 (2d Cir.), cert. denied, 423 U.S. 1015 (1975); *United States v. Koss*, 506 F.2d 1103, 1112-13 (2d Cir. 1974), cert. denied, 421 U.S. 911 (1975); see also *United States v. Wilner*, 523 F.2d 68, 73-74 (2d Cir. 1975). Cf. *United States v. Gonzales*, 488 F.2d 833 (2d Cir. 1973)."

549 F.2d at 274. Also see *United States v. Salazar*, 485 F.2d 1272, 1280 n.15 (2d Cir.), cert. denied, 415 U.S. 985.

In short, the government submits that, by failing to consider the context in which the phrases in question were spoken, the manner in which they were spoken, and the explanation which preceded their having been spoken, the appellant has overlooked the clear distinction which separates impermissible assertion of personal belief from permissible advocacy that the jury should find a particular way on the basis of the evidence. Cf. *Lawn v. United States*, 355 U.S. 339, 359 n.15 (1958); *United States v. LeFevre*, 483 F.2d 477, 478-79 (3d Cir. 1973); *Keeble*

v. *United States*, 347 F.2d 951, 956 (8th Cir.), cert. denied, 382 U.S. 940 (1965).

E. The prosecutor did not in any way denigrate the appellant's lawyer, nor did he unfairly characterize the appellant

The appellant's claim that the prosecutor made a series of prejudicial remarks which "denigrated" defense counsel was similarly raised in, and rejected by, the District Court. The government respectfully submits that the reason for the trial court's rejection of this claim is that it is untrue, unfair, and unsupported either by the text of the argument itself or manner in which it was delivered. Specifically, appellant contends¹¹ that the prosecutor's reference to the fact that defense attorney's argue in every case that the government has failed to establish guilt "beyond a reasonable doubt", and his following explanation of the term (See Tr. 286-287), consti-

¹¹ With respect to appellant's contention that the prosecutor denigrated defense counsel, his claim in this court is, as it should be, limited to the scope of his objection in the trial court. *Lawn v. United States*, 355 U.S. 339, 359 n. 5 (1958); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Appellant's objection in the District Court was solely that the prosecutor's remarks carried the implication that he would "trick" the jury with the concept of reasonable doubt. He should not now be permitted to characterize other things as "denigrating" when it is apparent from his lack of objection that he previously did not consider them to be. Cf. *United States v. Bentner*, 457 F.2d 1174, 1175 n. 2 (2d Cir.), cert. denied 409 U.S. 842 (1972).

Parenthetically, the government also notes that none of the objections raised by the appellant either here, or in the District Court, was made in the presence of the jury. Thus counsel was free to be loose with his characterizations and interpretations. Had the jury been present to serve as a test tube for the accuracy of appellant's claims, the government suggests, they would have been far less sweeping.

tuted an "insinuating remark about defense attorneys in general and their theatrical use of the concept of reasonable doubt" (Appellant's Brief at 10 ¶ 2) and further (insinuated . . . that anything Buckley would say was a ploy, a defense attorney's trick to get his client off.). (Appellant's Brief at 8 ¶ 1). The government respectfully maintains, and the trial court's ruling clearly indicates, that the remarks to which the appellant refers carried with them no "insinuations" whatsoever, and certainly not the implications which appellant reads into them.

To the contrary, a fair reading of the remarks in question indicates that the prosecutor's first reference to the concept of reasonable doubt, and the frequency with which it is raised as a defense in criminal cases, was intended simply to stress its importance. This is clear from the fact that, almost in the very next breath (Tr. 286, lines 23-25), the prosecutor advised the jury that Judge Clarie would explain what the term meant, and expressly asked them to "please listen". This is not only not prejudicial, the government suggests, it is not even objectionable.

The prosecutor's next reference to the concept was in direct response to the defense's opening statement, where defense counsel himself indicated twice that the issue before the jury was whether the government could prove its case *beyond a reasonable doubt*. Specifically, the prosecutor anticipated that defense counsel would once again argue that there had been no proof beyond a reasonable doubt, alerted the jury to that likelihood, and offered a counter-argument, based exclusively on the evidence, that there most certainly had been proof beyond a reasonable doubt (See Tr. 287, line 12, through Tr. 288, line 16). The government submits that this too was non-objectionable. Cf. *United States v. Wilkins*, 422 F.Supp. 1371, 1377-1378 (E.D. Penn. 1976).

Appellant's claim that he was "unfairly characterized" by the prosecutor also lacks merit. Specifically, appellant complains that the prosecutor unfairly characterized him as a "drug dealer" twice (*See* Tr. 261, 106). In connection with this claim, the government makes two points. First, an examination of the remarks to which the appellant refers clearly indicates that the prosecutor was not referring specifically to the appellant, but referred, in the first instance, generally to the relative ease with which informants with criminal records are able to purchase drugs from "a dope dealer".¹² (Tr. 261). In the second instance, the prosecutor, once again not referring specifically to the appellant, stated that the people who sold the cocaine in question were "dope dealers", since cocaine is, by law, a narcotic. (Tr. 282).

However, even if the remarks *were* construed as referring to, or characterizing the appellant, the government submits they were not objectionable in view of Trooper Valentin's testimony, and clearly not prejudicial in view of the District Court's finding. Specifically, Valentin testified that appellant *twice* offered to sell cocaine to Luis Lopez on the late afternoon of February 9, 1976 alone. This, the government maintains, is a solid evidentiary basis from which logically to infer that the appellant is indeed a drug dealer. This inference is further supported by Valentin's testimony as to the conversation of February 4th, the testimony of Luis Lopez as to appellant's remarks inside of 15 Cabot Street at the time of the sale, and appellant's facilitation of the drug purchase from Frankie Melendez by Trooper Valentin immediately after the February 9th transaction.

¹² The appellant should not be heard, nor does he appear, to complain that the term "dope" was used rather than a euphemism like "controlled substance", since he did not object when any of the witnesses used the term, and defense counsel himself used it. (*See e.g.* Tr. 138, line 18).

Unflattering comments and descriptions are not improper when they are supported by the evidence. *United States v. Windom*, 510 F.2d 989, 994 (5th Cir.), *reh. denied* 515 F.2d 510, *cert. denied* 423 U.S. 863 (1975); *Spaulding v. United States*, 279 F.2d 65, 68 (9th Cir.), *cert. denied* 364 U.S. 887 (1960). *Cf. United States v. Gonzales*, 488 F.2d 833, 836 (2d Cir. 1973); *United States v. Guidarelli*, 318 F.2d 523, 525 (2d Cir.) *cert. denied* 375 U.S. 828 (1963); *United States v. Walker* 190 F.2d 481, 484 (2d Cir.), *cert. denied* 342 U.S. 868 (1951); *United States v. Wolfson*, 322 F.Supp. 798, 827 (D.Del. 1971).

On the basis of all of the foregoing, the government urges this Court to reject appellant's contentions.

F. Several other miscellaneous factors dictate that the appellant's claims should be rejected

Several miscellaneous factors also require a rejection of appellant's claim. First, all of the various arguments and assertions which the appellant makes with respect to the prosecutor's closing argument are aimed at establishing the very thing which an experienced, impartial trial judge, *who was there to hear what was said and the way it was said*, expressly found did not occur: prejudice. Had the trial court believed that the prosecutor's arguments truly were as the appellant describes him, there is no question but that he would have found prejudice. The fact that he did not find prejudice is thus also a finding that appellant's description of the argument are inaccurate. This finding, the government respectfully submits, is not "clearly erroneous." It should not, therefore, be overturned.

Secondly, the manner in which the appellant objected is also relevant in assessing the sincerity and legitimacy

of his claim. The government suggests that, had appellant *truly* believed the prosecution's summation were prejudicial, he would have objected *at the time* the allegedly improper remarks were made. His failure to do so, it is submitted, conflicts with the policy behind the objection requirement of *United States v. Socony-Vacuum Oil*, 310 U.S. 150 (1940).

"The requirement of objection as set forth in the *Socony-Vacuum* decision services two closely related policies. First, there is the notion of judicial economy; the trial court should have the first chance to correct any trial errors because its remedies are ordinarily less burdensome and expensive than appellate reversal. Second, there is the *moral notion* that the defendant should not be allowed to 'ride the verdict'; he should not be able to have a conviction set aside on the basis of secret, 'hip-pocket' error while he can retain the benefit of a verdict of acquittal." Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 Texas L.R. 629, 648 (1972). (Emphasis added).

See also *United States v. Lawson*, 337 F.2d 800, 807 (3rd Cir. 1964); *United States v. Bentner*, 457 F.2d at 1175 n. 2.

Finally, appellant's claim overlooks the fact that, immediately after the summation which he now attacks, defense counsel gave a forceful and lengthy argument attacking every point he believed the prosecutor had made (except with respect to the testimony of Trooper Valentin, which was not mentioned). To assume, as appellant does, that the jury listened only to the prosecutor and not to his own counter-arguments, attributes to them little or no common sense, judgment, and ability to discriminate. Cf. *United States v. Nolan*, 551 F.2d

272, 274 (10th Cir. 1977). Appellant's claim also overlooks the fact that, at the conclusion of summation, the trial court fully and carefully charged the jury, in a charge which the appellant does not claim to be inadequate, that they were the sole judges of the fact. The fact that the jury later returned with a question (Tr. 370), indicates that they relied upon, and took seriously, those instructions. As Judge Friendly indicated in *United States v. Santana*, 485 F.2d 365, 370 (2d Cir. 1973), except in the most extreme instances "the judge's charge can be counted on to set things right." Cf. *United States v. Homer*, 545 F.2d 864, 867-868 (3rd Cir. 1976).

On the basis of all of the arguments contained in Part I, sections A through F, the government respectfully submits that Judge Clarie's ruling should be upheld and that appellant's claim should be rejected.

II.

The trial judge's refusal to disqualify himself constituted neither an abuse of discretion nor a denial of appellant's right to a fair trial.

Appellant's next argument, that Judge Clarie was personally "prejudiced" against him and that he improperly refused to disqualify himself, is totally unfair and equally lacking in merit. Not only is the record in the present case completely barren of even the slightest hint of bias or animus on the part of the trial judge, cf. *United States v. Hernandez Vela*, 533 F.2d 211, 214 (5th Cir. 1976); *United States v. Bray*, 546 F.2d 851 (10th Cir. 1976), but the two bases from which the appellant asks this court to "infer" prejudice are themselves, both legally and factually, inadequate to require disqualification. Specifically, Melendez assails the trial judge's impartiality because: (1) Judge Clarie sentenced him on an unrelated drug charge in 1976 and, subsequently, violated

his probation in 1973; and (2) Judge Clarie presided at the trial of appellant's co-conspirator, Jesus Ortiz, whom he subsequently sentenced to a seven year term of imprisonment. For purposes of clarity, each of these contentions is analyzed separately.

A. The fact that Judge Clarie once previously sentenced the appellant on an unrelated charge is an adequate basis from which to infer "personal bias or prejudice"

Several additional things should be considered in evaluating appellant's claim that Judge Clarie was "prejudiced" by virtue of having sentenced him in 1970, and by having violated his probation in 1973. First, a close examination of the record indicates that *two* juries were actually picked to dispose of the charges against Kiki Melendez. The first jury selection occurred on July 7, 1976, shortly before defense counsel's unavailability required that the case against Melendez be severed from that against Jesus Ortiz. Despite the fact that appellant clearly knew that it was Judge Clarie who had sentenced him in 1970, and violated his probation in 1973, at no time prior to the selection of that jury did he move for Judge Clarie's disqualification, or otherwise complain of judicial "prejudice." This is significant, the government submits, because if appellant truly believed, as he now claims, that Judge Clarie was "prejudiced" by virtue of previously having sentenced him, he surely would have sought disqualification at that time.

Secondly, the government asks this Court to consider the circumstances under which the appellant finally did move for Judge Clarie's disqualification. On November 16, 1976, while the entire jury panel was *in the courtroom* awaiting selection (Tr. 4), appellant requested an in-chambers hearing at which he *orally moved* for dis-

qualification. At this point, through counsel, the appellant expressed, for the very first time, "concern" that Judge Clarie's 1970 and 1973 judicial involvement with him, coupled with the fact that Judge Clarie had presided over the trial of his co-conspirator, Jesus Ortiz, *nearly four months earlier*, had impaired the Court's impartiality. The extent to which a litigant truly feels his rights are in jeopardy can sometimes be gauged by the speed and manner in which he acts to vindicate them. The government submits, and respectfully urges this Court to hold, that if appellant truly had harbored a legitimate question as to Judge Clarie's impartiality he would not have sat silently until literally *moments* before jury selection was to have begun. Rather, he would have moved, perhaps by way of written motion, at the conclusion of the Ortiz trial or, at the very latest, the Ortiz sentencing, which occurred on September 27, 1976.

Lastly, the government requests this Court to consider the lack of *specificity* of the motion made on November 16, 1976. In his oral motion, and during the course of his argument in support of it, the appellant failed to allege, much less point to objective evidence of, a single fact or circumstance indicating bias or animus on the part of the trial judge. This lack of specificity, the government maintains, rendered his motion legally, and fatally, insufficient.¹³

¹³ A motion for disqualification pursuant to Title 28, United States Code, section 455, requires as much particularity and specificity as a motion pursuant to Title 28, United States Code, section 144. Cf. *Mavis v. Commercial Carriers, Inc.*, 408 F.Supp. 55, 60-61 (C.D. Calif. 1975); *Hirschkop v. Virginia State Bar Ass'n.* 406 F.Supp. 721, 724-725 (E.D.Va. 1975); *Samuel v. University of Pittsburgh*, 395 F. Supp. 1275, 1279 (W.D.Pa. 1975). Such a motion requires more than a mere recitation of unsupported conclusions. *United States v. Wolfson*, — F.2d — (2d Cir. 1977), Docket No. 76-1393, *slip op.* at 4030 (June 3, 1977). It should, therefore set forth specific instances in the nature of

[Footnote continued on following page]

Besides being factually dubious, the first prong of appellant's attack on Judge Clarie's impartiality is also legally unsound. The law is quite clear that a trial judge is not vulnerable to disqualification simply by virtue of the fact that he previously presided at a proceeding involving a particular defendant. This principle has been enunciated in a variety of contexts. See *Panico v. United States*, 412 F.2d 1151 (2d Cir. 1969), *cert. denied*, 397 U.S. 921 (1970) (sentencing judge may preside at hearings pursuant to Rule 35, F. R. Crim. P., and Title 28, United States Code, section 2255); *United States v. Fodrell*, 523 F.2d 86 (2d Cir.), *cert. denied*, 423 U.S. 950 (1975) (judge who presides at wiretap hearing may preside at trial); *United States v. Partin*, 552 F.2d 621, 637, n. 21 (5th Cir. 1977) (judge who presides at suppression hearing may preside at trial). It has also been held that a judge is not disqualified from presiding at the trial of defendant who was previously tried before him in another matter. *Smith v. United States*, 360 F.2d 590, 592 (5th Cir. 1966); *United States v. Sansone*, 319 F.2d 586, 587 (2d Cir. 1963) (Per Curiam). This principle stands in simple recognition of the fact that our

evidence indicating bias or animus. See generally Annotation, *Disqualification of Judge for Having Decided Different Case Against Litigant*, 21 ALR 3d 1369, particularly at 1375. Moreover, with respect to a claim of "personal bias", Title 28, United States Code, section 455(b)(1) requires a concrete showing that the alleged bias "stem[s] from an *extrajudicial* source. . . ." *Wolfson, supra*, slip op. at 4027 (emphasis added). Also see *Davis v. Board of School Commissioners of Mobile County*, 517 F.2d 1044, 1051-1052 (5th Cir. 1975) (Bell, J.), *cert. denied*, 425 U.S. 944 (1976). Judged by the foregoing criteria, appellant's motion for Judge Clarie's disqualification was inadequate, and failed even to approach, much less to overcome, the *presumption* of impartiality and qualification. See, e.g., *United States v. Zagari*, 419 F.Supp. 501 (N.D.Calif. 1976). In denying that motion the trial judge was not only "not clearly erroneous", he was clearly correct.

judicial system does not provide for judges to be "disposable after one use." *United States v. Harris*, 458 F.2d 670, 678 (5th Cir.), *cert. denied sub nom. Scott v. United States*, 409 U.S. 888 (1972). Also see Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 763, n. 116 (1973).

Moreover, *United States v. Simon*, 393 F.2d 90 (2d Cir. 1968), the case upon which appellant places major reliance, and which he asks this Court to view as "controlling," actually *supports* the government. Contrary to appellant's interpretation *Simon* stands for the proposition that, however salutary a different practice might be, a trial judge *may* preside at the retrial, after reversal, of a case he has previously tried. This is made abundantly clear in *United States v. Newman*, 481 F.2d 222, 223 (2d Cir.), *cert. denied*, 414 U.S. 1007 (1973), and even more recently by Judge Feinberg when he observed:

"We understand that regardless of a court's fairness, a defendant who has undergone two lengthy trials before the same judge, both of which ended in guilty convictions may come to consider that judge as biased against him. These suspicions are understandable, but, without more, they do not provide a reasonable basis for questioning a judge's impartiality." *United States v. Wolfson*, — F.2d — (2d Cir. 1977), Docket No. 76-1393, *slip op.* at 4030 (June 3, 1977).

Also see *United States v. Partin*, *supra*, 552 F.2d at 639. If a trial judge may preside at the same trial of the same case against the same defendant twice, it follows that he may likewise permissibly preside at different times over different trials of different cases against a defendant. In short, the fact that Judge Clarie sentenced Kiki Melendez in an unrelated case in 1970, and subsequently violated his probation, did not, and does not, provide a reasonable basis for questioning his impartiality.

B. The fact that Judge Clarie presided at the trial of appellant's co-conspirator did not endow him with "personal knowledge of disputed evidentiary facts", cause him to be biased, or otherwise require his disqualification

Appellant Melendez asks this Court to infer on the part of the trial court "personal bias . . . prejudice . . . and personal knowledge of disputed evidentiary facts" because Judge Clarie presided over the severed trial of Melendez's co-conspirator, Jesus Ortiz, with whom he was jointly indicted. Because Judge Clarie permitted the case against Ortiz to go to the jury, so the argument runs, "it can be presumed that he believed Lopez's version of the story." Therefore, according to the appellant, the trial judge had already formed a belief that he was guilty. The government submits, and urges this Court to hold, that this contention also lacks merit.

The standard for determining whether the government's evidence is sufficient to permit its case to reach the jury is whether a reasonable mind might fairly conclude guilt beyond a reasonable doubt. *See, e.g., United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972); *United States v. Figueroa-Paz*, 468 F.2d 1055, 1058 (9th Cir. 1972). The fact that Judge Clarie permitted the government's case against Jesus Ortiz, which included substantive counts, as well as a conspiracy count, charging confederation with Kiki Melendez and others to the Grand jury unknown, does not by any stretch of the imagination indicate that Judge Clarie had formed an opinion as to the appellant's guilt or innocence. Rather, it simply indicates Judge Clarie believed there was sufficient evidence from which the jury properly concluded that Ortiz was guilty of the substantive offenses and had also unlawfully conspired with someone (e.g., the unidentified who summoned Lopez back to the house, the uniden-

tified woman who handed him the cocaine, or Kiki Melendez). Moreover, even assuming that Judge Clarie did, as the appellant suggests, resolve in the government's favor a credibility contest between Jesus Ortiz's defense witnesses and Luis Lopez, the law is clear that "credibility choices are not disputed facts [within the meaning of Title 28, United States Code, section 455(b)(1)]." *Parrish v. Board of Commissioners of the Alabama State Bar*, 524 F.2d 98, 104 (5th Cir. 1975).

Additionally, the government respectfully maintains several courts have squarely held that disqualification under either Title 28, United States Code, section 144 or section 455 is not required by virtue of a trial judge's previously having presided over the severed trial of a co-conspirator. See, *United States v. Cowden*, 545 F.2d 257, 265-266 (1st Cir. 1976), *cert. denied*, — U.S. —, 97 S.Ct. 1181 (1977) (noting that the judicial system could not function if judges could deal "but once in their lifetime" with a given defendant or had to withdraw because they had presided in a companion case); *United States v. Partin*, *supra*, 552 F.2d at 639 (in the absence of objective indicia of bias in the record, recusal not required); *United States v. Clark*, 398 F. Supp. 341, 362-363 (E.D. Penn. 1975) (characterizing a claim similar to the present one as "frivolous").

C. Judge Clarie did not commit an abuse of discretion in denying appellant's pre-trial motion for disqualification

Assuming, for the purposes of argument only, that appellant complied with the procedural requirements of Title 26, United States Code, section 455,¹⁴ the govern-

¹⁴ The government does not, however, concede that there has been compliance with the procedural requirements of Title 28, United States Code, section 455. Although the text of section

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ment submits that the decision as to whether to grant or deny that motion rested with the sound discretion of the District Court. See, e.g., *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1052 (5th Cir. 1975) (Bell, J.). This is especially so where, as here, each of the two bases upon which the appellant relied, was *independently* insufficient to require disqualification (see Part II, A and B, *supra*).

As the following portion of the legislative history of section 455 indicates, the statute clearly contemplates such an exercise of discretion.

At the same time, in assessing the reasonableness of a challenge to his impartiality, *each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision.* Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where

455 does not state that an affidavit is required in support of a motion pursuant thereto, the government submits that an affidavit is *nevertheless* required. If this were not so, then section 455 would effectively overrule section 144 with respect to motions alleging bias. There is nothing in the legislative history of section 455 which indicates that this was Congress' intent. Although, as *United States v. Wolfson*, — F.2d — (2d Cir. 1977), Docket No. 76-1393, *slip op.* at 4026-4027, particularly at n.11, indicates, "no appellate court has squarely faced this issue"; two District Court decisions, *Samuel v. University of Pittsburgh*, 395 F.Supp. 1275, 1277 (W.D.Penn. 1975) and *Harley v. Oliver*, 400 F.Supp. 105, 110 (W.D.Ark. 1975), support the government's position that an affidavit must be filed where, as here, sections 455 and 144 overlap.

there is a reasonable question of impartiality, but they are not entitled to judges of their own choice. Finally, while the proposed legislation would adopt an objective test, it is not designed to alter the standard of appellate review on disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion. 3 U.S. Code Cong. and Admin. News 6355 (1974).

Also see, Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 Harv. L. Rev. 1435 (1966).

On the basis of all of the foregoing, the government respectfully submits that Judge Clarie's refusal to disqualify himself was not, and should not be held to be, an abuse of discretion.

III.

The District Court did not commit an abuse of discretion in refusing to prohibit the government from using appellant's 1970 heroin distribution conviction for impeachment purposes.

On December 21, 1970 Enrique "Kiki" Melendez was convicted in the United States District Court for the District of Connecticut of the unlawful distribution of heroin in violation of Title 26, United States Code, section 4704. Prior to severance of his case from that against his co-conspirator Jesus Ortiz appellant moved for an order prohibiting the government from using that conviction for impeachment purposes. The District Court denied that motion, as well as an identical motion by Ortiz, on July 13, 1976. Appellant now seeks to overturn his conviction, claiming that the trial court abused its discretion in denying that motion, and representing fur-

ther that it was "for that reason" (i.e. his fear of being impeached) that he decided not to testify. See Appellant's Brief at 1, ¶ 2.¹⁵ For the following reasons, the government respectfully maintains that Judge Clarie acted well within his discretion in refusing to prohibit the government from using his prior conviction for impeachment purposes, and that appellant's claim to the contrary should be rejected.

A. The balancing test of Rule 609(a) vests wide discretion in the trial court and contemplates consideration of many variables

Rule 609(a) of the Federal Rules of Evidence strikes a balance between the traditional view that any prior felony conviction could be used for impeachment purposes and the approach set forth in *United States v. Luck*, 348 F.2d 763 (D.C. Cir. 1965), that only convictions involving dishonesty or false statements could be utilized. Accordingly, impeachment on the basis of a prior felony conviction is permissible under Rule 609(a)(1) if "the court determines that the probative value of admitting

¹⁵ Appellant's brief creates the misleading impression that Judge Clarie's July 13th denial of his motion was the "reason" why he decided not to testify. In actuality, however, there were several reasons why he decided not to testify. He himself so stated when he took the stand "for the limited purpose" of explaining the reasons for his decision. Specifically, he stated that Judge Clarie's ruling "and other things that [he and counsel had] discussed as to the facts of this case" prompted his decision (Tr. 248). At most, therefore, the trial court's ruling was simply one of many factors he took into consideration in deciding not to testify. Moreover, the government respectfully submits, his failure to make any offer of proof as to what his testimony would have been raises an additional serious question as to whether he ever intended to testify in any event. Cf. *United States v. Aloi*, 511 F.2d 585, 596 (2d Cir. 1975). Also see Transcript at 163.

this evidence outweighs its prejudicial effect to the defendant." By its terms, therefore, the Rule authorizes the trial court to exercise its discretion in determining whether, in the context of a *particular* case, the truth-seeking process would be advanced by either prohibiting or permitting the use of a particular conviction for impeachment purposes. This requires consideration of many variables.

"The statute, in our view, leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case. There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction. There may well be other cases where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction, to the issue of credibility. This last is, of course, a standard which trial judges apply every day in other contexts; and we think it has both utility and applicability in this field.

In exercising discretion in this respect, a number of factors might be relevant, such as the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and, above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction. The goal of a criminal trial is the disposition of the charge in accordance with the truth. The possibility of a rehearsal of the defendant's criminal record in a given case, especially if it means that the jury will be left without one version of the truth, may or may not contribute to that objective. The experienced trial judge has a sensitivity in this regard." 3 Weinstein, Evidence ¶ 609[03].

Frequently the balancing process "involves intangibles for which an appellate court's feel is nebulous at best." *Brooke v. United States*, 385 F.2d 279, 286 (D.C. Cir. 1967) (permitting under the circumstances of that case two prior drug convictions to be used for impeachment at defendant's narcotics trial).

Although *United States v. Palumbo*, 401 F.2d 270 (2d Cir. 1968), offers guidance to District Courts as to the factors which should be considered in balancing probative value against prejudicial effect, that decision as well recognizes that it is the trial court which is most familiar with the circumstances to a particular case, and hence often in the best position to determine in which direction the balance tips. Neither *Palumbo*, nor *United States v. Puco*, 453 F.2d 539 (2d Cir. 1971), prohibits a defendant's impeachment in a narcotics trial on the basis of a recent felony conviction also involving narcotics. *Id.* at 543, n. 10. Both decisions implicitly recognize that there may be instances in which such impeachment is appropriate and, as other circuits have found, fair. See generally, *United States v. McIntosh*, 426 F.2d 1231, 1233, n. 2 (D.C. Cir. 1970); *United States v. Escobedo*, 430 F.2d 14, 18-20 (7th Cir. 1970); *United States v. Villegas*, 487 F.2d 833 (9th Cir. 1973); *United States v. Rucker*, 496 F.2d 1241 (8th Cir.), *cert. denied*, 419 U.S. 965 (1974); *United States v. Davis*, 501 F.2d 1344 (9th Cir. 1974); *United States v. Clossen*, 383 F. Supp. 1119, 1123-1124 (E.D. Pa. 1974) (all of which permitted the use of prior narcotics convictions for impeachment purposes in subsequent narcotics trials).

Most recently, in *United States v. Ortiz*, — F.2d — (2d Cir. 1977), Docket No. 76-1460, *slip op.* (April 11, 1977), *rehearing and en banc consideration denied*, — F.2d — (June 19, 1977), which involved the instant appellant's co-conspirator, this Court rejected the precise

argument appellant now makes, holding that Rule 609(a) "gives broad discretion to the trial judge and its exercise should not be disturbed absent a clear showing of abuse." *Id.*, slip op. at 2792. The *Ortiz* decision, it is respectfully submitted, should be viewed by this Court as dispositive of the appellant's claim.

B. Under the circumstances of the present case the District Court cannot, and should not, be held to have abused its discretion in denying appellant's motion

As the appellant himself indicates, Judge Clarie was familiar with the facts and circumstances surrounding his 1970 heroin distribution conviction. There is, the government submits, no better judge as to the probative value of a particular conviction than the trial judge who presided at the time of the entry of that conviction, and ultimately imposed sentence on the basis of it. Similarly, as appellant also concedes, Judge Clarie knew that his involvement with narcotics was not confined simply to events leading to his conviction, but was continuing in 1973, less than three years before the commission of the instant offense, when his probation was violated.

The District Court was similarly aware that, despite the unchallenged, uncontroverted testimony of Connecticut State Trooper Rafael Valentin that on *two* separate occasions on the afternoon of February 9th Melendez expressly offered to sell cocaine to Luis Lopez, if he returned to 15 Cabot Street *alone*, there was the potential for a credibility contest between Melendez and Lopez at least with respect to the substantive counts of the indictment. In line with this, the defense attempted to undermine Lopez's credibility, impeaching him not simply on the basis of felonies and misdemeanors, involving dishonesty, but also on the basis of *arrest* which occurred

well prior to his presence, much less his cooperation in the District.¹⁶

Under these circumstances, it is respectfully submitted, the District Court was well within its discretion in authorizing the government to elicit, and the jury to hear with appropriate limiting instructions, every *shred* of evidence which Judge Clarie felt would assist them in their search for truth. To have done otherwise would have falsely, and unjustifiably, made Kiki Melendez appear "pristine" by comparison to Luis Lopez, *cf. United States v. Jackson*, 405 F. Supp. 938 (E.D.N.Y. 1975); *United States v. Reddington*, 433 F.2d 997 (4th Cir. 1970), and would have misled the jury by permitting Melendez to "appear as one entitled to full belief when that [was] not the fact." *United States v. Palumbo*, *supra*, 401 F.2d at 273. Also see *Gordon v. United States*, 383 F.2d 936, 941 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968) (holding that in credibility contests between two persons—the accused and the accuser—there are "greater, not less, compelling reasons for exploring all avenues which would shed light on which of the two witnesses was to be believed.").

On the basis of the foregoing, it is submitted that the District Court acted within, and did not commit an abuse of, its discretion under Rule 609.

¹⁶ For example, during the course of cross examination, defense counsel asked Luis Lopez:

"Q. Could you give us a guesstimate how many times you have been arrested since 1952?

Mr. Smith: Your Honor, I object to that.

The Court: The law is clear, Counselor. You know what it is."

(Tr. 144) Also see Tr. 148-149 and n. 10, Part I, D, *supra*.

CONCLUSION

The conviction of Enrique "Kiki" Melendez is fully and fairly supported by the record. The judgment of the District Court is sound and, the government respectfully urges that it should be affirmed.

Respectfully submitted,

PETER C. DOLFEY

United States Attorney

District of Connecticut

141 Church Street

New Haven, Connecticut 06510

THOMAS P. SMITH

Assistant United States Attorney

for the District of Connecticut

GOVERNMENT'S APPENDIX

1a

Notice

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
Crim. Misc. H-76-2

UNITED STATES OF AMERICA

—v.—

ENRIQUE MELENDEZ, a/k/a "Kiki"

Peter C. Dorsey, the United States Attorney for the District of Connecticut, and Thomas P. Smith, his Assistant, do hereby accuse the defendant, ENRIQUE MELENDEZ, a/k/a "Kiki" of having previously been convicted of violating laws of the United States relating to narcotic drugs, said previous conviction being that:

On or about the 21st day of December, 1970, in the District of Connecticut, the defendant was convicted before the Honorable T. Emmet Clarie, of one count charging him with a violation of Title 26, United States Code, section 4704(a);

and on or about the 29th day of October, 1973 the United States Probation Office in Hartford issued a warrant for the defendant for a violation of probation. On November 26, 1976 probation was revoked and the defendant was sentenced by the Honorable T. Emmet Clarie to two years under NARA for a violation of Title 26, United States Code, section 4704(a);

and the judgment of said conviction is and has become prior to filing this information, a final judgment.

/s/ PETER C. DORSEY
PETER C. DORSEY
United States Attorney

/s/ THOMAS P. SMITH
THOMAS P. SMITH
Assistant United States Attorney



